its filed tariff.[1] *See id.* Petitioner sought damages as a result of being charged the rates set forth in Affinity's federally-filed tariff, rather than the rates allegedly advertised to it by Affinity. *See id.*

On November 12, 2002, Affinity removed this case to the United States District Court for the Central District of Illinois on the grounds that, despite its state-law label, Petitioner's claim arose under federal law, and/or was preempted by federal law, because Petitioner was in actuality challenging the terms of Affinity's federal tariff. *See id.* Petitioner filed a Motion to Remand on November 18, 2002. In addition, in lieu of an answer, Affinity filed a motion to stay the proceedings and compel arbitration on November 15, 2002.

By Order entered on March 17, 2003, the district court denied Petitioner's motion to remand and granted Affinity's motion to compel arbitration and stay the case pending the outcome of arbitration. App. 22a. Thereafter, the case was sent to arbitration before retired Judge Richard E. Neville. App. 24a. On April 12, 2004, Arbitrator Neville entered a decision in the case, ruling that Petitioner's claims were barred by the filed tariff doctrine. *See id.*

Following its defeat in arbitration, Petitioner filed an amended complaint asserting state law breach of contract and consumer fraud claims, again alleging that its purported reliance on Affinity's advertising and solicitation in ***early 1999*** somehow resulted in damages supposedly sustained after the tariff-filing requirement was cancelled by the FCC

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1. Petitioner attached to its complaint copies of two of Affinity's advertisements that were allegedly faxed to Petitioner in 1999, and a copy of a 1999 invoice for services provided by Affinity to Petitioner.

on July 31, 2001.[2] App. 25a-26a. Indeed, since its original claims were dismissed as barred by the filed tariff doctrine, in a last ditch effort to revive its case, Petitioner resorted to manufacturing a claim that it was "induced" by Affinity's alleged fraudulent conduct in early 1999 to sign up for service, but only sustained damages (in the form of paying more for long distance services) over two and one half years later. *See id.*

On June 18, 2004, Affinity filed a motion to dismiss the amended complaint, arguing, among other things, that Petitioner's claims were preempted by federal law, despite the fact that Petitioner's amended complaint purported to seek damages that were allegedly sustained post-detariffing. App. 26a. On July 12, 2004, the district court entered an order granting Affinity's motion to dismiss. App. 21a-34a. The court concluded that federal law governs the rates for long-distance service contracts, and state law cannot operate to invalidate these contracts, even after detariffing. App. 30a. Because Petitioner's amended complaint sought to invalidate Affinity's rates for its long-distance service, the district court held that it was preempted by federal law. *See id.* The district court also acknowledged that:

> [Petitioner] has alleged that [Affinity] made misrepresentations in its advertisements in 1999, before detariffing, and alleges that bills it received after July 31, 2001, were contrary to the advertised rates. Therefore, [Petitioner] is not alleging breach of a contract which was formed after detariffing.

App. 33a. Accordingly, the district court dismissed with prejudice Petitioner's amended complaint.

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2. Petitioner attached to its amended complaint copies of the same advertisements that were allegedly faxed to petitioner in 1999, and a copy of the same 1999 invoice for services provided by Affinity to petitioner that were attached to Petitioner's initial complaint.

2. Proceedings Before The Court of Appeals For The Seventh Circuit

On appeal to the Seventh Circuit, Petitioner challenged the district court's dismissal of its amended complaint. App. 1a-20a. The Seventh Circuit affirmed the district court's ruling in its entirety. *See id.* Specifically, the Seventh Circuit opined that:

> Sections 201 and 202 of the FCA, read together, express Congress's intent that long-distance customers receive uniform and reasonable rates, terms, and conditions of service. . . . Section 203, which required the filing of tariffs, was simply the express means of effectuating Congress's intent, which remained unchanged despite the passage of the Telecommunications Act of 1996 and the onset of detariffing. *See id.* ("[D]etariffing does not alter the fundamental design of the [FCA], nor modify Congress's objective of uniformity in terms and conditions for all localities.") . . . [A]lthough the FCC was authorized to dispense with the tariff-filing requirement, it must first ensure that, consistent with Congress's intent, a tariff would "not [be] necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory.". . . . Moreover, . . . even the FCC understood that detariffing "did not affect [FCC] enforcement of carriers' obligations under [S]ections 201 and 202[,]" which expressed Congress's intent. Id. at 422 (citation omitted). Thus, the FCA continues to provide federal

> remedies for customers seeking to challenge the justness and reasonableness of long-distance charges and practices. 47 U.S.C. §§ 207, 208.

App. 8a-10a (internal citations omitted).

The Seventh Circuit found that the claims asserted in Petitioner's amended complaint, which challenged the fact that Affinity's rates were expressed in "TCU's" (either pursuant to Affinity's tariff or CSA) rather than cents per minute, were really challenges to the reasonableness and fairness of the rates charged by Affinity. App. 15a-16a. The Court ruled that it "agree[d] with the district court's conclusion that even after amending its complaint, [Petitioner's] claims and the relief it sought primarily concern the rates Affinity has charged for its long-distance service and should be preempted." App. 16a. Thus, the Court held that Petitioner effectively sought to invalidate Affinity's rates, which is not a claim that is cognizable under state law. App. 15a-16a (*citing Boomer*, 309 F.3d at 423-424).

Significantly, with respect to Petitioner's breach of contract claim, the Seventh Circuit held that the claim was barred based upon the fact that Petitioner "candidly conceded at argument that the claim necessarily challenged the rates contained in Affinity's filed tariff." App. 11a. Importantly, Petitioner has not disputed this admission in its Petition and has thereby admitted the uncontroverted notion that challenges to a carrier's rates must be governed by federal law. As that is the only issue presented by the Petition for review and Petitioners have essentially conceded the point, there is no reason for review.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT WARRANTING REVIEW BY THIS COURT

A. This Court Has Already Declined To Review The Alleged Split Between The Courts In *Ting* And *Boomer*

Petitioner's sole argument in support of its Petition is based upon the differing perspectives of the Ninth Circuit in *Ting v. AT & T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 450 U.S. 811 (2003) and the Seventh Circuit in the *Boomer v. AT & T Corp.*, 309 F.3d 404 (7th Cir. 2002), rather than any "split" generated by the Seventh Circuit's ruling in the instant case. Notably, this Court already declined to review the alleged split created by *Boomer* and *Ting* in October 2003, when it denied AT&T's Petition for Certiorari in *Ting*. *See* 450 U.S. 811 (2003).[3] Further, since this Court declined review in *Ting*, no other circuit court has weighed in on the issue creating the alleged split between the Seventh and Ninth Circuit. Thus, there is no new basis upon which this Court should now accept review.

In addition, it would be premature for this Court to review the alleged conflict created between *Boomer* and *Ting*. Since the FCC implemented its Detariffing Orders on August 1, 2001, only two circuit courts (the Seventh Circuit in *Boomer* and this case, and the Ninth Circuit in *Ting*) have considered the issue of preemption following detariffing. Thus, due to the limited number of courts that have weighed in on this issue, this Court's intervention is not warranted here.

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3. In fact, as noted in Point B *infra*, there is no split between the holdings of *Boomer* and *Ting*.

B. Significant Factual Differences Between *Boomer* And *Ting* And This Case Weigh Heavily Against Review

1. *Boomer* And *Ting* Addressed Non-Rate Specific Issues, While This Case Directly Involves Rates

Unlike this case, which involves state law challenges to Affinity's long distance service rates (which fall squarely in the scope of Section 202(a)), both *Boomer* and *Ting* addressed state law unconscionability challenges to arbitration clauses in AT&T's CSA. Thus, as a precursor to their preemption analysis, the courts in *Boomer* and *Ting* had to address whether the arbitration clauses at issue affected the rates charged by AT&T. Here, there is no doubt that Petitioner's claims directly affected (and indeed attacked) Affinity's rates.

In *Boomer*, the court found that because the provisions requiring arbitration produce cost savings for carriers, they produce lower rates for telecommunications service. Therefore, the Seventh Circuit held that because rates were affected by the arbitration clauses, Sections 201 and 202 of the Communications Act were implicated and preempted state law challenges to those clauses. *See Boomer*, 309 F.3d at 418-21.

Contrary to the court's finding in *Boomer*, the Ninth Circuit in *Ting* relied on the district court's finding of fact, which was made following trial, that the arbitration clause at issue did not affect AT&T's rates, and on that basis, held that the plaintiff's challenges to the CSA's arbitration clause were not preempted by Section 201 or 202. *See Ting*, 319 F.3d at 1140-41, 47 ("the case at bench contains specific findings of fact, finding that the CSA's arbitration provisions did not in fact affect AT&T's costs" in providing service, and therefore could not possibly lead to either price

differences from state to state or in price discrimination among otherwise similarly situated customers.)[4]

2. This Case Directly Involves Rates And Is Therefore Distinguishable From *Ting*, And Not In Conflict With *Ting* Or *Boomer*

The different factual findings made by the courts in *Ting* and *Boomer*, as to whether arbitration clauses in CSAs have any effect on rates, is the only basis for the differences in the holdings of *Boomer* and *Ting*. Such a factual difference, however, does not create a split warranting this Court's review because unique factual findings, rather than the law, provide for the difference in result in these two cases. Further, in this case, there is no question as to whether Sections 201(b) and 202(a) are implicated because Petitioner challenges the rates charged by Affinity. App. 16a. Thus, this case is factually distinct from *Boomer* and *Ting*, and there is no conflict between the holding of this case and those of *Boomer* or *Ting*.

II. THIS CASE IS A POOR VEHICLE TO ADDRESS THE RELATIONSHIP BETWEEN FEDERAL AND STATE LAW IN THIS AREA BECAUSE OF THE UNIQUE FACTS OF THIS CASE

In any event, this case is a poor vehicle to address the relationship between federal and state law in the wake of detariffing because of the unique facts of this case. As the District Court ruled, and the Seventh Circuit affirmed, the

4. These findings of fact render the court's statements in *Ting*, regarding the lack of preemptive reach of Section 201(b) and 202(a) as to rates, dicta because the court found that *there was no evidence* to support the claim that the challenged portions of the CSA had any impact on rates. The court's statements in dicta are the statements that Petitioner relies on in support of its claim that there is a split between the Ninth and Seventh Circuits.

Petitioner's amended complaint here did not allege that Affinity made any misrepresentation or breached any contract formed after detariffing. Rather, in a meager effort to circumvent the filed tariff doctrine, Petitioner claimed that Affinity's advertising and solicitation in ***early 1999*** somehow resulted in damages supposedly sustained ***after July 31, 2001***.[5] App. 11a.

Because all of the wrongful conduct alleged by Petitioner here relates to the time period when the tariff-filing requirement was in effect, Petitioner's claims are barred by the filed tariff doctrine or at the very least, inextricably intertwined with the tariff. The law is settled that under the filed tariff doctrine, courts may not award relief (whether in the form of damages or restitution) that would have the effect of imposing any rate other than that reflected in the filed tariff. *See Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-90 (7th Cir.), *cert. denied*, 524 U.S. 952 (1998); *see also Ting*, 319 F.3d at 1143. This is so even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation. *See Cent. Office Tel.*, 524 U.S. at 222 (holding that the carrier cannot be held to the promised rate even if it conflicts with the published tariff). Also under the filed tariff doctrine, customers of common carriers (including Petitioner) are charged with notice and knowledge of both the existence and the terms of the federally-filed tariff. *See Central Office Tel.*, 524 U.S. at 222; *Maislin Indus.*, 497 U.S. at 127 (*quoting Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)). Under these precepts, all of Petitioner's claims against Affinity are barred by non-controversial application of the filed tariff doctrine.

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5. There is no allegation that Petitioner relied on any advertisements or solicitations, after July 31, 2001. In addition, and as the Seventh Circuit found, it is undisputed that prior to August 1, 2001, Affinity charged Petitioner in accordance with the terms provided for in its filed tariff. Affinity gave Petitioner notice that effective August 1, 2001, its services would be provided in accordance with rates, terms, and conditions contained in a customer service agreement that Affinity posted on its website.

Petitioner's assertion in the Petition that "[a]ll of Affinity's relevant conduct and services took place after 1996 (following Congress' passage of the 1996 Act, which ended the mandatory filing requirements of the FCA)" demonstrates its fundamental misunderstanding of the 1996 Amendment to the Communications Act and the FCC's implementation of detariffing. Petition at p. 4. Indeed, Petitioner believes that because Congress amended the Communications Act in 1996, Petitioner's claims based on Affinity's alleged conduct in 1999 are not subject to the filed tariff doctrine. It is beyond debate, however, the tariff-filing requirement was not cancelled until two and one half years later, on July 31, 2001. *See Second Report and Order*, 11 FCC Rcd. 20,730 (1996); *Interstate Interexchange Marketplace*, 12 FCC Rcd. 15,014 (1997); *Interstate Interexchange Marketplace*, 14 FCC Rcd. 6004 (1999). Indeed, courts have applied the filed tariff doctrine to disputes arising after the enactment of the 1996 amendments to the Communications Act. *See Metro E. Ctr. For Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 925 (7th Cir. 2002) (detariffing did not occur until July 31, 2001 and the "tariff was in force when the parties' dispute arose [from February through July 2001] and thus governs its resolution").

Thus, by Petitioner's own account, it complains of its reliance on Affinity's advertisements during the time period when the tariff-filing requirements were still in effect. Because this case involves claims that arose prior to detariffing (despite Petitioner's best efforts to plead around the filed tariff doctrine) or at the very least, that are inextricably intertwined with the tariff, this case is a poor vehicle to address the relationship between state and federal law in a detariffed environment. Moreover, there is no unresolved split in the circuits regarding the application of the filed tariff doctrine. *See Central Office Tel.*, 524 U.S. at 222-24.

III. THE PETITIONER HAS NOT PRESENTED AN IMPORTANT FEDERAL QUESTION THAT WARRANTS THIS COURT'S REVIEW

Further, this Court should deny certiorari because the Petitioner has not presented an important federal question that warrants review by this Court. Petitioner argues that it presents an important question based on its erroneous claim the Seventh Circuit's ruling permits a carrier to "say one thing, but do another, with immunity if not impunity." Petition at p. 11. Petitioner's claim, however, misstates the law.

As recognized by the FCC, in the detariffed environment, long distance service customers are protected against unjust and unreasonable rates and practices by the substantive provisions of Sections 201 and 202 of the Communications Act. *See Second Report and Order*, 11 FCC Rcd. at 20,743. Indeed, in its *Second Report and Order*, the FCC found that compliance with the substantive requirements of these provisions would be adequately assured in the present competitive market by customers either "switch[ing] to different carriers," or availing themselves of the "complaint process" prescribed by Section 208 of the Communications Act. *Id.*

Thus, and contrary to Petitioner's claim, customers of long distance service carriers have sufficient remedies to address a carrier's alleged malfeasance – they can either switch carriers and/or avail themselves of the complaint process set forth in the Communications Act. For this reason, it is not important for this Court to decide whether customers may also bring state claims in addition to the remedies provided in Communications Act.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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